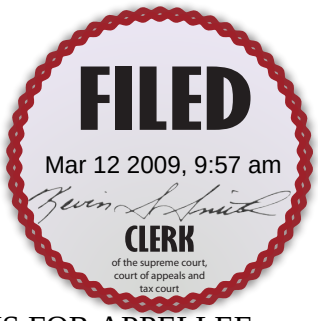

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IN THE COURT OF APPEALS OF INDIANA

KANGO DOUGLAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0808-CR-468
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles Wiles, Senior Judge
Cause No. 49G04-0709-FA-202928

March 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kango Douglas appeals his class B felony burglary conviction and his ninety-five-year aggregate sentence for five felony convictions. We affirm his conviction, vacate his sentence, and remand with instructions to revise his sentence to fifty-five years.

Issues

Douglas raises the following issues for review:

I. Is the evidence of "breaking" sufficient to sustain his burglary conviction?

II. Is the ninety-five-year sentence inappropriate in light of the nature of the offenses and his character?

Facts and Procedural History

Around 1:00 a.m. on August 20, 2007, L.C. was home alone and heard a knock at the door. She repeatedly asked "Who is it?" Tr. at 27. When she could not discern the response, she moved closer to the door. Because she did not have a peephole, she cracked the door open. She continued to ask "Who is it?" and Douglas repeatedly responded, "Juan." *Id*. at 27-29. She inched the door open in an attempt to hear the muffled voice. Eventually, she told Douglas that nobody by that name lived there, and she started to close the door. Douglas stuck a gun in the door and said, "Bitch, get back in there." *Id*. at 30. L.C. complied. Douglas entered the home, closed the door, and demanded the money from her purse. He grabbed her and pushed her into the bedroom and forced her at gunpoint to put his penis in her mouth. He raped her and then forced her to perform oral sex on him again. Afterwards,

he searched the home and took $200 from under the sofa cushions. He left, and L.C. called the police.

Officers obtained evidence from the home, including semen on a towel that both L.C. and Douglas had used immediately after the attack. L.C. underwent a forensic examination at the hospital, during which police obtained another semen sample from dried secretions on her lip. Later, L.C. identified Douglas from a photographic lineup, and police obtained a buccal swab from him. Douglas's DNA sample matched those obtained from L.C. and the towel.

On September 27, 2007, the State charged Douglas with class A felony rape, class A felony criminal deviate conduct, class B felony burglary, class B felony robbery, and class B felony criminal confinement. On June 10, 2008, a jury found Douglas guilty as charged. On July 8, 2008, the trial court sentenced Douglas to forty years for rape, forty years for criminal deviate conduct, and fifteen years for burglary, all to run consecutively, for an aggregate sentence of ninety-five years.[1] This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Sufficiency of Evidence

Douglas contends that the State failed to present evidence sufficient to sustain his burglary conviction. When reviewing a sufficiency claim, we neither reweigh evidence nor

[1] The trial court merged the criminal confinement conviction with the rape and criminal deviate conduct convictions and merged the robbery conviction with the burglary conviction. The court entered judgment only on the rape, criminal deviate conduct, and burglary convictions.

judge witness credibility. *Hall v. State*, 870 N.E.2d 449, 462 (Ind. Ct. App. 2007), *trans. denied*. Rather, we look to the evidence and reasonable inferences most favorable to the verdict. *Id*. "We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id*.

Indiana Code Section 35-43-2-1(1)(A) provides that a person armed with a deadly weapon who breaks and enters another person's building or structure, with intent to commit a felony in it, commits class B felony burglary. On appeal, Douglas does not deny that he entered L.C.'s home with a gun and committed a felony there; instead, he asserts that the State failed to prove the element of "breaking." Our supreme court has held that even the slightest use of force to gain unauthorized entry satisfies the "breaking" element of burglary. *Davis v. State*, 770 N.E.2d 319, 322 (Ind. 2002). This includes opening an unlocked door or pushing open a door that is slightly ajar. *Id*. The force need not be actual, but could include the threat of force to allow entry. *Dew v. State*, 439 N.E.2d 624, 625 (Ind. 1982).

In *Hall*, we held the evidence sufficient to support an inference of force amounting to a "breaking" where the defendant held a gun on the property owners as they opened the door of their duplex. 870 N.E.2d at 463. Likewise, here, L.C. cracked the door open because she could not hear Douglas's muffled utterances. Once she discovered that he was seeking a person named Juan, she attempted to close the door. At that time, Douglas stuck his gun through the doorway and ordered her to "get back in there." Tr. at 30. Douglas's threat of force allowed him to gain access to L.C.'s home and therefore constituted a breaking. Accordingly, we affirm Douglas's burglary conviction.

II. Sentencing

Douglas also challenges the appropriateness of his ninety-five-year aggregate sentence. On appeal, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the reviewing court that his sentence meets the inappropriateness standard. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.

The jury convicted Douglas of two class A felonies and three class B felonies. For sentencing purposes, the trial court merged two of the class B felonies with the remaining convictions. The sentencing range for a class A felony is twenty to fifty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4. The sentencing range for a class B felony is six to twenty years, with an advisory sentence of ten years. Ind. Code § 35-50-2-5. "[T]he advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Anglemyer*, 868 N.E.2d at 494.

We first address the nature of Douglas's offenses. Douglas used a gun to force his way into L.C.'s home. Once inside, he used the gun to extract money from her. He then pointed the gun at her head while he raped her and forced her to perform oral sex. The trial court described the offenses as "horrendous." Tr. at 191. The record gives no indication that L.C. suffered any permanent physical injury; however, the State read into the record a letter in which L.C. described the impact of Douglas's acts upon her mental and emotional well-

being. She stated that she was "not ruined but … scarred." *Id*. at 182. She noted lost time at work and with family and indicated that she had to be put on anti-depressants. *Id*. at 181-82. Although the depravity of Douglas's acts cannot be downplayed, their impact did not exceed that which would be expected for a victim of these crimes.

We next address Douglas's character. The trial court identified his young age as a mitigating factor. Because he was eighteen at the time he committed these crimes, his adult criminal history is brief—one class A misdemeanor conviction for dangerous possession of a firearm. As a juvenile, he had six delinquency adjudications that resulted in true findings and numerous additional run-ins with law enforcement. The true findings involved crimes against property as well as persons. Douglas has been offered alternative sentencing options and has a history of probation violations. He was on probation when he committed the instant offenses. Douglas's criminal history reflects unfavorably on his character.

In the exercise of our review and revise function, we are sensitive to the impact of criminal behavior on all persons involved. However, in an attempt to ensure consistency among sentences, we are mindful of our supreme court's words in *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008):

> Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. In the vast majority of cases, whether these are derived from multiple or single counts, involve maximum or minimum sentences, and are concurrent or consecutive is of far less significance than the aggregate term of years. And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case …. [A]ppellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual

count.

Id. at 1224-25.

We conclude that Douglas's ninety-five year aggregate sentence is inappropriate. In reaching this conclusion, we condone neither the instant crimes nor his numerous acts of juvenile delinquency. However, we cannot conclude that Douglas's numerous transgressions necessarily demonstrate "a character of such recalcitrance or depravity" as to justify a ninety-five-year sentence. *Frye v. State*, 837 N.E.2d 1012, 1015 (Ind. 2005); *see also Hollin v. State*, 877 N.E.2d 462, 465 (Ind. 2007) (revising sentence of eighteen-year-old burglary and habitual offender defendant with numerous juvenile offenses from forty to twenty years). The forty-year sentence imposed for each of the two class A felony convictions represents an enhancement of ten years above the thirty-year advisory term; this enhancement appropriately accounts for the violent and serious nature of the offenses as well as for Douglas's unsavory character. We therefore vacate his ninety-five-year term and remand with instructions to run the forty-year sentences for the two class A felonies concurrently, with the fifteen-year sentence for burglary to run consecutive thereto, for an aggregate term of fifty-five years.[2]

Accordingly, we affirm Douglas's burglary conviction, vacate his ninety-five-year sentence, and remand with instructions to enter an aggregate sentence of fifty-five years.

Affirmed, vacated, and remanded.

ROBB, J., and BROWN, J., concur.

[2] Douglas committed the instant offenses while on probation for the class A misdemeanor firearm offense. Therefore, to the extent that time remains on his sentence for that offense, the fifty-five-year sentence must run consecutive to it. *See* Ind. Code § 35-50-1-2(d)(1).